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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

THE TOLEDO MANUFACTURING COMPANY, S. W. SIVER, H. J. WELLINGHOFF, S. C. H. TURNER, JESSE LANGDON, W. H. MANDEVILLE, J. W. SWAN AND STANTON GRIFFIS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio.

BRIEF ON BEHALF OF THE TOLEDO MANUFACTURING COMPANY, S. W. SIVER, H. J. WELLINGHOFF, S. C. H. TURNER, JESSE LANGDON, W. H. MANDEVILLE, J. W. SWAN AND STANTON GRIFFIS, APPELLANTS

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IN THE

Supreme Court of the United States

October Term, 1943

No. 11

THATCHER MANUFACTURING COMPANY ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio

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BRIEF ON BEHALF OF THATCHER MANUFACTURING COMPANY, R. W. NIVER, E. F. WELLINGHOFF, S. G. H. TURNER, JERVIS LANGDON, W. H. MANDEVILLE, F. W. SWAN AND STANTON GRIFFIS, APPELLANTS

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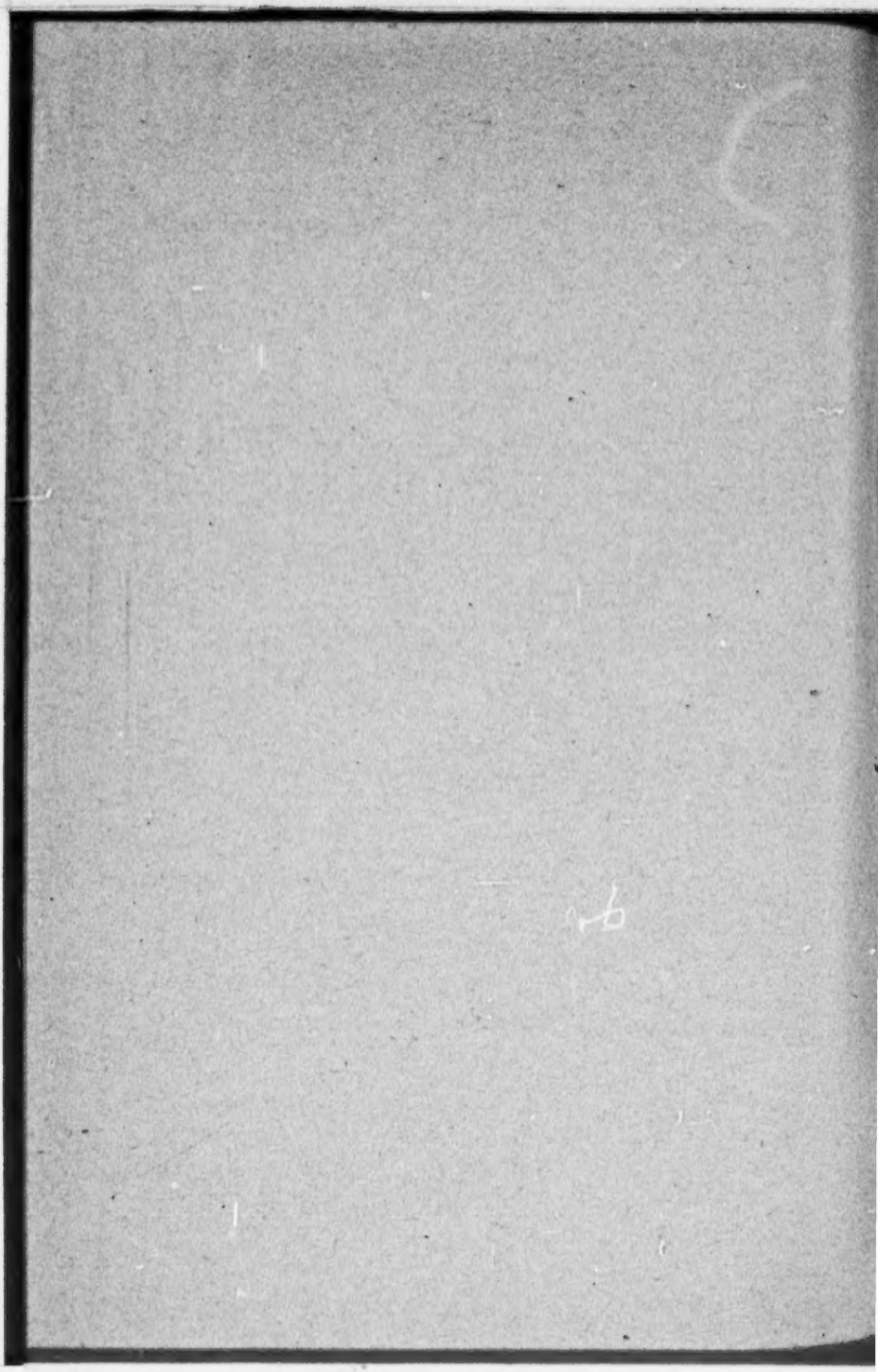

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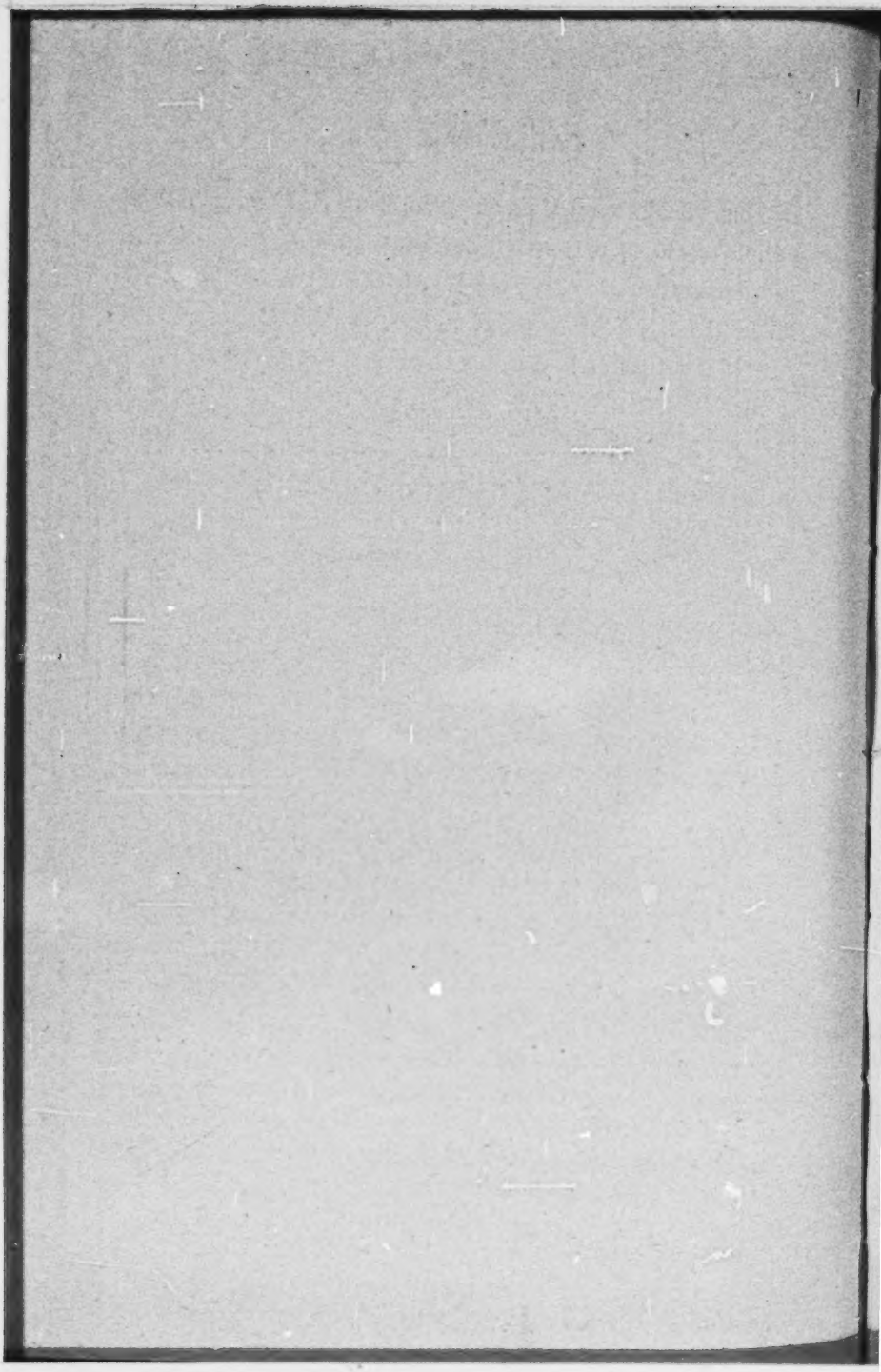

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This brief is filed on behalf of Thatcher Manufacturing Company and the individual appellants above named. The appellant H. C. Mandeville died on March 27, 1943.

THE OPINION BELOW

The opinion of the District Court of August 25, 1942, is reported in Volume 46 Federal Supplement, commencing on page 541, and has been printed as a part of the record in this court on appeal. The opinion contains the following (Rec. Opinion, pages 74-78, inc.):

> "The Conspiracy as Related to Milk Bottles.
>
> "The Thatcher Manufacturing Company was one of the earliest exclusive licensees for the use of the

Owens suction machine and it was confined to the manufacture of milk bottles.

"In 1920, Thatcher acquired from the Hartford-Fairmont Company exclusive rights for the use of the Hartford equipment in the milk bottle field. This equipment covered both the feeder and a bottle forming machine for which Hartford had the patent rights. At about the same time that Thatcher acquired these rights from Hartford, it paid the sum of $1,637,000 for the assets of three companies that had theretofore been licensed by Hartford to manufacture milk bottles, to-wit, the Essex Glass Company, the Travis Glass Company, and the Lockport Glass Company, and it acquired the license rights of the sole remaining licensee of the Hartford Company, to-wit, the J. T. and A. Hamilton Company. At about the same time, the latter company, J. T. and A. Hamilton Company, agreed in consideration of the sum of $100,000 to limit the sale of its production of milk bottles in the future to Allegheny County, Pennsylvania.

"Thatcher never received an exclusive license on the Hartford single feeder, but the record shows that Hartford felt morally bound not to license anyone to use the single feeder for the production of milk bottles without Thatcher's consent, and that Thatcher warned Hartford that it would consider this an unfriendly act.

"Under a new general agreement of January 1, 1936, Exhibit 248, Hartford continued to extend exclusive rights for the manufacture of milk bottles to Thatcher. In the centralization of the rights to manufacture milk bottles, the record indicates a cooperative effort upon the part of Hartford, Thatcher and Owens, the latter being engaged in the manufacture of milk bottles on its suction machines.

"A policy of inducing all outsiders to come under the Hartford licensing system, and the acquisition by outright purchase of companies engaged in the manufacture of milk bottles, was persistently followed by Hartford, Thatcher and Owens. Out of 15 companies originally manufacturing milk bottles, 6 were purchased by Thatcher, 5 by Owens, and 4 were given limited licenses by Hartford.

"On April 26, 1923, Hartford licensed Berney-Bond; in January, 1926, Buck and Winslow were given a restricted license by Hartford. In May, 1926, the Liberty Company took a Hartford license. Knox was licensed in August, 1932, Universal in September, 1932, Lamb in November, 1932, and Florida in August, 1935. The only remaining milk bottle producers, Atlantic Bottle Company and Peerless Glass Company were respectively bought out by Owens in 1930 and Thatcher in 1934.

"Exhibit 783 is a letter from W. E. Levis of Owens to R. H. Levis of the Illinois Glass Company, which at this time was merely an investment concern, dated August 2, 1932, in which we find the following:

'With the plans we now have, there is certain to be a curtailment of the promiscuous manufacture of milk bottles on non-licensed feeders, which will result in our company's and the Thatcher Company's securing a greater proportion of the available milk bottle business. This should stabilize the price and increase the earnings of the Thatcher Company.'

"It was about this time that a substantial purchase of Thatcher stock was made by the Illinois Company, which was engaged solely in investments in the stock of glass manufacturing companies, and of which W. E. Levis was president.

"Exhibit 787 is a letter from F. Goodwin Smith of Hartford to H. C. Mandeville of Thatcher, dated September 10, 1932, as follows:

'Will Levis has just telephoned me that you concur with him in the desirability of immediately getting Davis and Lamb into the fold under restricted conditions such as he mentioned. • • •

'I cannot see any quicker or better way for stabilization than what we have outlined.'

"In Exhibit 1161 from H. C. Mandeville of Thatcher to I. J. Collins of General, dated September 12, 1932, we find the following:

'Underwood'—Knox Company—'has come into the fold and I understand Universal and Lamb will follow.'

"Knox was brought into the fold under an extremely limited license whereby it was granted the right to make 75,000 gross of milk bottles annually. In this connection, it is interesting to refer to Exhibit 246, a letter from F. Goodwin Smith to Amory Houghton, president of Corning and also a director of Hartford, in February, 1934, which reads as follows:

'The license we gave Knox on milk bottles was limited and was approved by Thatcher and Owens.'

"It appears that Thatcher, as a favored licensee following 1920, exerted a keen interest in limiting production of other licensees for the manufacture of milk bottles and in preventing other companies from obtaining a license to manufacture milk bottles.

"Exhibit 1249 is a letter from F. Goodwin Smith of Hartford, to H. C. Mandeville, of Thatcher, dated December 23, 1929, and reads in part as follows:

'This morning when I came to the office I found your letter of December 20th, and also a memorandum from the Accounting Department showing that the Buck Glass Company had exceeded their allotment of 52,000 gross.

'The Buck Glass Company have not obtained our permission to make this over-run, but I suppose they went ahead, feeling that we would not take any legal steps against them for a slight over-run.'

"To this Mandeville replied (Ex. 431):

'Many thanks for your letter of 23rd December in respect of the Buck Glass Company. Their allotment as I understand it, was 52,000 gross. Please tell me how much they have exceeded their allotment. If it is a small amount I do not want to bother about it, but if it is a large amount I would like to devise some methods of holding it down because it is hurting.'

"Here is an interesting example of how tight the lines were drawn, through the license and lease system, on the licensees of Hartford, in order to effectuate almost a complete control, even in the minutest detail, over the operations of glass manufacturing concerns.

"Thatcher exerted its influence to prevent the Three Rivers Company from securing a Hartford license for the manufacture of milk bottles; and it operated in conjunction with Hartford in keeping newcomers out of the milk bottle industry. Exhibits 1247, 434, 435, 444, 471.

"Exhibit 246 is a letter from F. Goodwin Smith of Hartford to Amory Houghton of Corning, dated February 17, 1934, reading as follows:

'We admit that the purchase of the Peerless plant was an advantage to the industry and did relieve us of a troublesome situation. However, if Mandeville had not bought Peerless, Bill Levis would have bought Peerless and there would have been no claim on the part of Owens. * * *

'We have not been legally prohibited from licensing single feeders for milk bottles to anybody we saw fit, but during all these years we have protected Thatcher and Berney Bond and Buck by refusing to grant additional licenses for milks. This action on our part has stabilized the price situation and has been worth hundreds of thousands of dollars to Thatcher. It would have been a very simple thing for us to decentralize the production of milks throughout the country. * * *

'The only potential competitor which Mandeville now has who is not a licensee of Hartford, is Reed of Rochester, with a small yearly production of from twelve to fifteen thousand gross.'

"Reed is one of the four outsiders engaged in the manufacture of glassware that is now being sued by Hartford-Empire Company.

"Since 1935, Thatcher and Owens, as the leading manufacturers of milk bottles, Thatcher producing about 40% and Owens about 27%, have been in close cooperation. Substantial blocks of the stock of Thatcher were owned by the Illinois Glass Company until its recent dissolution. The latter company was owned and controlled by W. E. and R. H. Levis and members of their families. When W. H. Mandeville was elected to the board of Thatcher, he was requested by W. E. Levis 'to represent our stock interest on the board and keep in contact with us re-

garding the situation, which he has agreed to do' (Ex. 834). W. H. Mandeville is still on the board of Thatcher.

"From 1930 to 1938, Thatcher and Owens have manufactured from 65 to 70% of all milk bottles produced in the United States. All other producers of malk bottles, with the exception of the Reed Company, are licensees of Hartford.

"This close control of the milk bottle production in the United States, and the methods employed in attaining this control, due to agreements and understandings between Thatcher, Owens and Hartford, are clearly in violation of the anti-trust laws."

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 1167, 15 U. S. Code, Sec. 29, and Section 238 of the Judicial Code, as amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. Code, Sec. 345.

The case in the District Court was a suit in equity brought by the United States of America against Thatcher Manufacturing Company and individual defendants associated therewith, and other defendants, for an injunction under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, known as the Sherman Antitrust Act, and under Section 15 of the Act of Congress, October 15, 1914, c. 323, 38 Stat. 730, as amended, known as the Clayton Act, alleging violations by them of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The complaint was filed December 11, 1939. The final judgment of the District Court granting various injunctions was entered on October 8, 1942. A petition for appeal was filed by Thatcher Manufacturing Company and individual defendants associated therewith on December 3,

1942, and their appeal was allowed on the same day. Probable jurisdiction was noted on March 1, 1943.

STATUTE INVOLVED

The relevant provisions of Sections 1, 2 and 4 of the Sherman Act (Act of July 2, 1890, c. 647, Secs. 1, 2 and 4, 26 Stat. 209, 15 U. S. C., Secs. 1, 2, and 4) are as follows:

> Sec. 1. Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

The District Court did not find or adjudge that there had been any violation of the Clayton Act by these appellants.

STATEMENT OF THE CASE

The complaint states (par. 128, R. 38) that subsequent to 1916, and between 1928 and the time of filing the complaint, defendants Hartford and Owens, in order to carry out the conspiracy, monopoly and combination in restraint of trade thereinbefore alleged, and to maintain, strengthen and extend the said conspiracy, monopoly and combination in all of its aspects and particularly insofar as it related

to patents covering machinery for the manufacture of milk bottles, the manufacture and distribution of such machinery, and the manufacture and distribution of milk bottles, induced the defendants Thatcher and Liberty to join the combination and conspiracy for all purposes and particularly for the purpose of controlling and dominating the issuance of licenses to manufacture milk bottles, and of monopolizing and restraining interstate trade and commerce in the manufacture and distribution of milk bottles.

The complaint proceeds to relate the history of the licenses under which Thatcher Manufacturing Company carried on the manufacture of milk bottles by the use of automatic machinery. It was at all times a licensee under patents owned by others and never owned any patent or interest therein except such interest, if any, as it had in the Nagle lehr, concerning which it is alleged (par. 124, R. 37) that Hartford had claimed that the Nagle lehr developed for defendant Thatcher infringed the Hartford lehr patents, and Hartford in 1937 purchased from Thatcher its patent rights in respect to the Nagle lehrs.

The fact is, as shown by Exhibit H-5321 (R. 9619, ad. R. 4072), that Hartford purchased Nagle lehrs from Thatcher and not patent rights. The purchase of the lehrs was in accordance with the practice of Hartford to own the equipment and lease it to its licensees.

It was charged against Thatcher Manufacturing Company that it and Liberty Glass Company were the only licensees of Hartford, except Owens-Illinois Glass Company, which had unrestricted licenses to manufacture milk bottles under Hartford patents, and that Thatcher Manufacturing Company had an exclusive license on the Hartford "Two-Table" milk bottle forming machine and the right to obtain as many Hartford "single" feeders as it desired at a rate no higher than the lowest rate charged to other licensees.

In paragraph 135 of the complaint (R. 40) it is alleged that in December, 1932, Thatcher acquired the milk bottle business, machinery and license rights of Knox Glass Bottle Company, and that prior thereto, in August, 1932, Hartford had granted a license to the Knox Company limiting its annual production of milk bottles to 75,000 gross, which is alleged to be less than it had been manufacturing and selling, and that, this limitation becoming unprofitable, Knox sold its milk bottle business, and certain machinery and molds in connection therewith, to Thatcher for considerations partly in cash, partly in milk bottles and partly in common stock of Thatcher Manufacturing Company.

In paragraph 136 of the complaint (R. 40) it is alleged that in 1933 Thatcher purchased Peerless Glass Company, a manufacturer and distributor of milk bottles.

It is alleged in the complaint that other licensees had licenses which were restricted in their production, in various particulars which are set out in paragraphs 139 and 140 of the complaint (R. 41).

It is alleged in paragraph 141 of the complaint that Hartford had refused from time to time to license additional milk bottle production in order to protect Owens, Thatcher and Liberty from competition and several of such alleged refusals are set forth (R. 42).

It is alleged in paragraph 142 of the complaint that by reason of the matters stated prior thereto the defendants Owens, Thatcher and Liberty Glass have monopolized and are monopolizing the manufacture and distribution of milk bottles in the United States, and have restrained and are restraining interstate trade and commerce in the manufacture and distribution of milk bottles; that Hartford, through its dominant control of the patents and its licensing policies, had aided and abetted, and is aiding and abetting, such monopoly and restraint of trade and commerce (R. 42).

In paragraph 22 of the complaint (R. 10) it is alleged

that the individual defendants H. C. Mandeville, R. W. Niver, E. F. Wellinghoff, S. G. H. Turner, Jervis Langdon, W. H. Mandeville, F. W. Swan and Stanton Griffis have been and are officers or directors, and have participated and participate in the direction and management of the defendant Thatcher and that such individual defendants have approved, authorized, ordered and done some or all of the acts herein alleged to have been performed by defendant Thatcher. Other individuals were named as defendants in this paragraph, but the case has been dismissed as to them (R. 7692).

The answer of Thatcher Manufacturing Company and the individual defendants associated with it admitted that the individual defendants named in paragraph 22 of the complaint as the officers or directors of defendant Thatcher Manufacturing Company have been such officers or directors and have participated and participate in the direction and management of the defendant Thatcher Manufacturing Company, and have approved, authorized, ordered and done some or all of the acts alleged in the complaint to have been performed by defendant Thatcher Manufacturing Company; but they denied that they, or any of them, had so approved, authorized, ordered and done, except as an officer or director of defendant Thatcher Manufacturing Company, and they denied that any such acts were in violation of any one or more of the anti-trust laws of the United States, or were otherwise unlawful (R. 133).

The answer of these defendants commences on page 131 of the printed record. On behalf of Thatcher Manufacturing Company it was specific as to each of the statements made in the complaint, some transactions and contracts were admitted, and the substance of it was a denial that Thatcher Manufacturing Company and said individual defendants had participated in any unlawful conspiracy or combination in restraint of trade.

The District Court held that Hartford-Empire Company was engaged in a conspiracy in restraint of trade and that its license contracts were illegal. On the theory that the contracts were not enforceable against licensees the court cancelled all its license contracts. (Final Judgment, pars. 27 and 28, R. 7670-7671.) This was not limited to defendants against whom judgment was rendered, but included Anchor-Hocking and Liberty Glass Company, defendants who had been dismissed from the case, and other licensees who had not been made defendants.

Although the individual defendants associated with Thatcher Manufacturing Company were not charged with having done anything except that, as officers and directors of the company, they had participated in the direction and management of defendant Thatcher and had approved, authorized, ordered and done some or all of the acts alleged to have been performed by defendant Thatcher, such individual defendants were subjected to injunctions having no relation to anything involved in their acts and conduct as officers and directors of Thatcher Manufacturing Company and the company was enjoined from doing various things which it had not done or threatened to do.

The judgment of the District Court contains a large number of injunctions, some of which are complained of on the ground that no such injunction should have been granted. Others are complained of on the ground that they should not have been extended to include Thatcher Manufacturing Company and the individual defendants associated therewith. The injunctions complained of are set forth in detail in the specification of assigned errors intended to be urged, which is contained in this brief. To avoid repetition they are not set out here. They are discussed in the argument.

SPECIFICATION OF ERRORS ASSIGNED

The following is a specification of such of the assigned errors as are intended to be urged on behalf of Thatcher Manufacturing Company and others (R. 7835):

1. That the court erred in finding, adjudging and decreeing that Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, with others, had contracted, combined, and conspired to restrain trade, and monopolized, attempted to monopolize, combined and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Antitrust Act. (Final Judgment Subdivision 3.)

2. That the court erred in finding, adjudging and decreeing that Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, with others, had monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined, and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Antitrust Act with respect to patents covering inventions embodied in machinery used in the manufacture of glassware and with respect to machinery used in the manufacture of glassware. (Final Judgment Subdivision 4.)

3. That the court erred in finding, adjudging and decreeing that Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, with others, had monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined, and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Antitrust Act with respect to the manufacture of glass containers. (Final Judgment Subdivision 6.)

4. That the court erred in finding, adjudging and de-

creeing that Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, with others, had monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Antitrust Act with respect to the manufacture of milk bottles. (Final Judgment Subdivision 7.)

Each of the foregoing findings and adjudications is complained of on the ground that it is not sustained by the evidence and is contrary to law, said Thatcher manufacturing Company being merely a licensee of patented feeding and forming machines for the manufacture of milk bottles and not the owner of any patents on such machines, and such findings and adjudications being based primarily on its having had an exclusive license for a certain type of milk bottle machine and an unrestricted license for feeders, while others were denied licenses for such machines or given limited licenses for such feeding machines and licenses for other types of forming machines.

5. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, and all persons and corporations acting and claiming to act on behalf of them, from monopolizing, attempting to monopolize, combining and conspiring to monopolize, or agreeing, combining or conspiring to restrain trade as charged in the complaint herein in violation of the Sherman Antitrust Act and the Clayton Act and from engaging in or participating in practices, contracts, relationships, or understandings, or claiming any rights thereunder, having a tendency to continue or revive any of the aforesaid violations of the Sherman Antitrust Act and the Clayton Act. (Final Judgment Subdivision 9.)

Said injunction is complained of as being not sustained by sufficient evidence and contrary to law and on the further

ground that said injunction is in general terms and not specific in violation of Rule 65-(d) of the Rules of Civil Procedure and Section 383 of Title 28 U. S. Code.

6. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, who should thereafter engage or continue to engage in the business of distributing machinery used in the manufacture of glassware in interstate commerce from leasing or otherwise distributing or surrendering possession of said machinery by means other than by an outright sale for cash or credit not to extend over a period of more than two years. (Final Judgment Subdivision 21.)

7. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, from engaging in the distribution of machinery used in the manufacture of glassware or in the distribution of glassware in interstate commerce unless they, and each of them, while engaging in or continuing to be engaged in in the distribution of machinery used in the manufacture of glassware in interstate commerce should, by written instrument filed with the clerk of the said District Court, agree to offer and continue to offer to sell such machinery to any applicant (including, but not limited to, those not theretofore engaged in the manufacture of glassware) at reasonable and equal prices and upon reasonable and equal terms and conditions of sale to each applicant, said sales however not being required to be made to any applicant not having a proper credit rating, unless said applicant offers to pay cash, said order however not to be construed to prevent changes in price structure based on a change in economic or market conditions if notice of at least thirty days of any such change in price structure be first given to the glassware industry, and providing further that any applicant to whom any of said defendants

refuses to sell said machinery as above provided might apply to said District Court, on thirty days' notice only to the defendant which shall have refused to make said sale and to the Attorney General of the United States of America, for an order requiring and directing said defendant to make such sale. (Final Judgment Subdivision 23.)

8. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, from engaging in the distribution of machinery used in the manufacture of glassware or in the distribution of glassware in interstate commerce unless he or it should, by instrument filed with the clerk of said District Court within thirty days from the effective date of said decree:

> (a) agree to license without royalty or charge of any kind and for the life of the patents any applicant to make, to have made for it and to use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents or patent applications now owned or controlled by each of such defendants;
>
> (b) agree to license, at a reasonable royalty, any applicant to make, have made for it, and to use any number of machines and methods used in the manufacture of glasware and embodying inventions covered by any patents granted on patent applications filed subsequent to the date of this judgment, and then owned or controlled by each of such defendants; and
>
> (c) agree to make available to any licensee under sub-paragraphs (a) and (b) of this paragraph, a copy (at a cost not to exceed the cost of preparing the copy plus a reasonable profit) of any and all drawings and patterns owned or controlled by the respective defendant relating to the machinery or methods used in the manufacture of glassware embodying licensed inventions but this sub-paragraph shall not apply to Lynch type forming machines for the production of narrow neck glass containers;

and providing that if any dispute should arise between any

applicant for a license or licensee and any defendant under said paragraphs (a), (b) or (c) aforesaid, such dispute should be determined by the said District Court on petition by either such applicant or licensee or the defendant involved, on thirty days' notice to the other party to the dispute or to the Attorney General of the United States. (Final Judgment Subdivision 24.)

9. That the court erred in enjoining said defendants, and each of them, with others including Hartford-Empire Company, whenever regularly engaged in the manufacture and distribution of machinery used in the manufacture of glassware in interstate commerce, from discriminating, by means of wholly exclusive or partially exclusive requirement contracts with glassware manufacturing companies or otherwise, against any manufacturer of glassware, present or prospective, in the filling of orders for such machinery on the basis of the size of the order, the credit position of the customer (providing the customer pays cash), his standing in the industry or otherwise; and perpetually enjoining and restraining each of said defendants from directly or indirectly agreeing, conspiring or combining with any other person, firm or corporation for the purpose of obstructing or delaying the furnishing of any such machinery to any such customer or applicant, provided that nothing contained in the foregoing should prohibit a defendant from obtaining a contract or from enforcing contractual or other rights not otherwise prohibited by the terms of said judgment. (Final Judgment Subdivision 25.)

10. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, until the entry of a finding by said District Court, after petition filed by such defendant on thirty days' notice to the Attorney General of the United States and the hearing thereof, that the consequences of the conduct of such defendants in violation of

the Sherman Antitrust Act and the Clayton Act had been fully dissipated from:

(a) bringing, maintaining, or taking any action in pursuance of any suit or suits for infringement of any patent or patents now owned or controlled by any such defendant, or hereafter issued on pending applications now owned or controlled by any such defendant, covering inventions embodied in machinery used in the manufacture of glassware;

(b) attempting to interfere by suit or otherwise with the possession of machinery used in the manufacture of glassware now owned or claimed to be owned by any such defendant and which machinery is in the possession of a licensee or lessee of such defendant except in so far as may be necessary to enforce the terms of any contract of sale entered into pursuant to the provisions of said judgment referred to in Specification No. 9 hereof involving paragraph 21 of said judgment as above set forth; and

(c) attempting by suit or otherwise to collect royalties or license fees or profits for the use of inventions covered by patents now issued or hereafter issued on applications now pending embodied in machinery used in the manufacture of glassware licensed or leased by any such defendant. (Final Judgment Subdivision 26.)

11. That the court erred in declaring to be unlawful and cancelled, and in cancelling, and in enjoining the observance in any respect of each of the agreements, leases, licenses and amendments thereto, as follows the agreements dated December 8, 1920, April 13, 1928, and January 1, 1936, between Hartford-Fairmont Company or Hartford-Empire Company and Thatcher Manufacturing Company, together with all amendments to and leases or licenses issued under each of said agreements and every other agreement between Hartford-Empire Company and Thatcher Manufacturing Company (in so far as any of the agreements above referred to had not theretofore been cancelled or terminated) and in directing Thatcher Manufacturing Company to cause

any of its subsidiaries which were also party to any of such agreements, leases, licenses, or amendments to assent in writing to the cancellation thereof. (Final Judgment Subdivision 27.)

12. That the court erred in adjudging and decreeing that each agreement, together with all amendments thereto, relating to the leasing of machinery used in the manufacture of glassware, or the licensing of patented inventions embodied in machinery used in the manufacture of glassware, between Hartford-Empire Company and each of its licensees, including Thatcher Manufacturing Company and Olean Glass Company, be and it thereby was cancelled as of a date thirty days subsequent to the effective date of said judgment, and in enjoining the observance after such cancellation, by Hartford-Empire Company, its officers, directors, agents and employees, in any respect of any of such agreements, leases, licenses, and amendments thereto and in directing the receiver within thirty days after the effective date of said decree to notify all licensees of Hartford-Empire Company of the cancellation of said licenses and to offer them new licenses and to offer to sell said machinery to licensees, all in accordance with the terms of said judgment, after furnishing a copy of all such proposed new licenses to the Attorney General and to the Hartford-Empire Company and thereafter obtaining the approval of said District Court to the form of such licenses and providing that if either the Attorney General or the Hartford-Empire Company should object to the proposed form of any such new licenses they might be heard by said court prior to the final determination as to the form thereof. (Final Judgment Subdivision 28.)

Said provisions of said judgment are complained of on account of being not sustained by sufficient evidence and contrary to law and for the further reason that the plan of cancelling all license agreements and making new license

agreements only in such form as above provided deprives Thatcher Manufacturing Company and Olean Glass Company of contract rights which they had at the commencement of this action and may create a condition under which one or both of them may not be able to use the machinery and equipment in their respective plants for the manufacture of glassware for a period of time causing irreparable injury.

13. That the court erred in enjoining Thatcher Manufacturing Company and the said individual defendants associated therewith, and each of them, and the Hartford-Empire Company, from inserting or enforcing or requiring any other party to agree to any provision in any agreement theretofore or thereafter entered into by him or it which

(a) directly or indirectly limits or restricts

(1) the type or kind of product which can be produced with or upon machines or equipment or processes embodying inventions licensed under patents or patent applications owned or controlled by him or it, (2) the use of such product so produced, (3) the character, weight, color, capacity, or composition of the product so produced, (4) the quantity thereof so produced, (5) the market (either as to territory, customers, or class of customers) to or in which the same may be sold or distributed, (6) the price or terms of sale or other dispositions of such products, or (7) the use of any machinery or equipment distributed, or patented inventions licensed, by him or it, to use in connection with any other machinery or equipment distributed, or inventions licensed, by him or it, or to use in any specified plant or locality; or

(b) gives or purports to give a right to terminate any license if any machinery or equipment is not so used; or

(c) which expressly provides that any licensee shall not contest the validity of any patent or patents of such defendant; or

(d) provides that parts and equipment constituting improvements on leased or sold machinery, made

by the licensee, shall become the property of the lessor or vendor; or

(e) provides that rights to improvements, including inventions, patent applications and patents covering licensed inventions embodied in machinery or processes or methods made or acquired by the licensee, shall become the exclusive property of the lessor or vendor; or

(f) grants to any licensee, lesee or vendee of any product, machine, or equipment, when such product, machine or equipment embodies inventions covered by patents or patent applications owned or controlled by it or him, a preferential position, whether by means of lower rates of royalty, by different provisions of licensing, leasing, or sale, by exclusive licenses, rebates, discounts, a share in net or gross income or any part thereof, or by any other means. (Final Judgment Subdivision 29).

14. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, their officers, directors, agents and employees from entering into any agreement with Hartford-Empire Company containing any of the provisions set forth in the foregoing Specification No. 13 hereof and enumerated in said Subdivision 29 of said judgment. (Final Judgment Subdivision 30.)

15. That the court erred in adjudging and decreeing that the form of any agreement between any of the defendants, including Thatcher Manufacturing Company, and of any license agreement made pursuant to said judgment and to which any of the defendants should be a party, should be subject to the approval of said district court, on petition by and defendant proposing to enter into any such agreement on ten days' notice to the Attorney General, except that it should be unnecessary to obtain the approval of the court as to the form of any agreement which is identical (except as to parties, dates, number and types of

machines involved) with any form theretofore approved by the court. (Final Judgment Subdivision 31.)

Said provision is complained of as being contrary to law and as likely to result in there being a period of time within which Thatcher Manufacturing Company and its subsidiary Olean Glass Company would be without any license or contract entitling them to use the machinery and equipment in their respective plants for the manufacture of glassware and without the use of which said plants could not be operated.

16. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, from requiring, requesting or inducing Hartford-Empire Company or its officers, directors, agents or employees to seek the permission, advice or consent of them or any of them before licensing newcomers in the glassware industry, or before allowing the existing licensees of Hartford-Empire Company to manufacture additional types, kinds or amounts of glassware. (Final Judgment Subdivision 32.)

17. That the court erred in enjoining the individual defendants associated with Thatcher Manufacturing Company from holding or controlling, directly or indirectly, or through corporations, agents, trustees, representatives, or nominees, any of the issued and outstanding capital stock, bonds or other evidence of indebtedness of more than one corporation engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware provided that the foregoing should not apply to the holding of stock by any individual defendant solely in a fiduciary capacity for the benefit of a person or persons other than defendants herein but that no defendant holding stock in a fiduciary capacity should exercise any voting rights with respect to such stock or give any proxy to vote the same;

and provided further that nothing contained in the foregoing should apply to the holding by any individual defendant of stocks, bonds, or other evidences of indebtedness in any subsidiary, parent, or subsidiary of the parent of a corporation in which he is an officer, director, agent or employee, or any corporation solely engaged in business outside the territorial limits of the United States of America or its territories; and provided that each of said defendants required by the foregoing to divest himself of any stock, bonds, or other evidence of indebtedness, should submit to the court, with notice to the Attorney General, a written statement containing the name or names of those to whom such stock, bonds or other evidences of indebtedness had been sold or otherwise transferred. (Final Judgment Subdivision 33.)

18. That the court erred in adjudging and decreeing that each of said individual defendants who has, on or subsequent to December 11, 1939, sold or otherwise transferred ownership or control of the stock, bonds or other evidences of indebtedness of any corporation engaged in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware, other than the one of which he was an officer or director at the time of such transfer, should within ten days of the effective date of said judgment submit to the court, with notice to the Attorney General, a written statement containing the name or names of those to whom the stock, bonds or other evidences of indebtedness had been sold or otherwise transferred. (Final Judgment Subdivision 34.)

19. That the court erred in perpetually enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them, while engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery to be

used in the manufacture of glassware, or both, from acquiring, purchasing, holding or controlling, directly or indirectly, or through agents, representatives, or nominees, any of the assets (except goods or merchandise purchased in the ordinary course of business) or any of the capital stock or bonds or other exidences of indebtedness of any other defendant corporation except of the defendant corporation of which he is an officer or director. (Final Judgment Paragraph (A) Subdivision 36.)

20. That the court erred in perpetually enjoining Thatcher Manufacturing Company and the individual defendants associated therewith, and each of them while engaged in the manufacture and sale of glassware or in the manufacture or distribution of machinery to be used in the manufacture of glassware, or both, from acquiring, purchasing, holding or controlling, directly or indirectly, or through agents, representatives, or nominees, any of the assets, (except goods or merchandise purchased in the ordinary course of business) or any of the capital stock or bonds or other evidences of indebtedness of any other corporation, firm, or individual so engaged, except a corporate defendant as to its own subsidiary or an individual defendant as to the subsidiary of the defendant corporation of which he is an officer or director or any of the corporate defendants as to holding or acquiring assets, capital stock, or bonds or other evidences of indebtedness in any corporation engaged solely in business outside of the territorial limits of the United States of America or its territories. (Final Judgment Paragraph (B) Subdivision 36.)

21. That the court erred in enjoining Thatcher Manufacturing Company and the individual defendants associated therewith from agreeing with any other manufacturer or seller of glassware or of machinery to be used in the manufacture of glassware, its directors, officers, agents or employees to limit the production of glassware or

to collect, compile, analyse or distribute data concerning the production, sales, orders, shipments, deliveries, costs or prices of glassware, where there is any disclosure of data concerning any particular manufacturer and from distributing data concerning the production, shipments, sales, orders, costs, or prices of any manufacturer of glassware or of machinery to be used in the manufacture of glassware except as between officers, directors or employees of the same corporation and except any action lawful under the Miller-Tydings Act. (Final Judgment Subdivision 40.)

22. That the court erred in granting an injunction restricting Thatcher Manufacturing Company and the individual defendants associated therewith in acquiring patents, patent applications or exclusive rights under patents or patent applications covering inventions embodied or employed in machinery or processes used or to be used in the manufacture of glassware, or prosecuting applications for such patents, or agreeing with others with respect to patent or applications covering such inventions. (Final Judgment Subdivisions 51, 52, 53 and 54.)

23. That the court erred in ordering that representatives of the Department of Justice shall, on written request of the Attorney General, be permitted, subject to legally recognized privilege, to have access to the books, ledgers, accounts, correspondence, memoranda and other records and documents of Thatcher Manufacturing Company. (Final Judgment Subdivision 55.)

24. That the court erred in holding that patent license agreements between the principal manufacturer and distributor of automatic machinery used in the manufacture of unpatented glassware, and manufacturers of unpatented glassware, containing restrictions designed to result in restriction or stabilization of the production of unpatented glassware made on such machinery, and which have that effect, are contracts in violation of Section 1 of the Sher-

man Act in that they unreasonably restrain trade, regardless of the fact that the license agreements do not contain provisions fixing, pegging or stabilizing the price at which glassware made on the licensed machinery may be sold. (Conclusion of Law Number 33.)

25. That the court erred in holding that once a defendant has been shown to have been a party to a conspiracy in violation of the anti-trust laws, the burden is on that defendant to go forward and show that it thereafter took some positive step to denounce or withdraw from the conspiracy. (Conclusion of Law Number 42.)

SUMMARY OF ARGUMENT

At the time of the commencement of this action in the District Court, Thatcher Manufacturing Company was engaged in the manufacture of milk bottles by automatic machinery as a licensee of Hartford-Empire Company under an agreement dated January 1, 1936. By this agreement Thatcher Manufacturing Company was given the exclusive right to use the Hartford "Two Table" milk bottle forming machine and an unrestricted, but non-exclusive, right to the use of Hartford "single" feeders in the manufacture of milk bottles. (Complaint par. 138, R. 40-41.) (Ex. 248, R. 8956, ad. 1047.)

Thatcher Manufacturing Company had not been engaged in the distribution of machinery for the production of glassware and the machinery which it was using for the manufacture of milk bottles was leased from Hartford-Empire Company. At the time of the commencement of this action Thatcher Manufacturing Company had no patents, so far as the evidence discloses, on machinery for the manufacture of glassware, or on lehrs, or on other equipment relating thereto.

The finding of the District Court that Thatcher Manufacturing Company had participated in a conspiracy to re-

strain trade seems to be based on the theory that the licensing system of Hartford-Empire Company was illegal, that it had no right to grant an exclusive license, and had no right to limit the licenses of others when it had granted an unrestricted license to Thatcher Manufacturing Company, and had no right to consult with Thatcher Manufacturing Company concerning restrictions in the licenses of others. It is contended that the court erred in this conclusion, at least, so far as it involved Thatcher Manufacturing Company, that the court erred in adjudging that Thatcher Manufacturing Company and the individual defendants associated therewith had violated the Sherman Anti-trust Act and erred in cancelling its said license agreement and all prior license agreements.

The remainder of the argument relates mainly to various injunctions contained in the final judgment of the District Court. Many of these injunctions were extended to include Thatcher Manufacturing Company, and the individual defendants associated therewith, without any consideration of their situation as compared with that of those against whom the injunctions were manifestly directed.

By subdivision 23 of the final judgment (R. 7667) Thatcher Manufacturing Company and said individual defendants were required, in order to continue in the distribution of glassware in interstate commerce, to file with the Clerk of the District Court a written instrument agreeing to offer to sell machinery used in the manufacture of glassware, although they had not been engaged in the sale or distribution of such machinery.

By subdivision 24 of the final judgment (R. 7667) they were required, in order to continue in the distribution of glassware in interstate commerce, to file an instrument with the Clerk of the District Court agreeing to license without royalty any applicant to make and use machines and methods used in the manufacture of glassware and

embodying inventions covered by any patent or patent applications now owned or controlled by them, and to do other things of a similar character, although they owned no patents or patent applications.

By subdivision 26 of the final judgment (R. 7669) they were enjoined, until the entry of a finding by the District Court, from bringing, maintaining or taking any action in pursuance of any suit or suits for infringement of any patent or patents now owned or controlled by them, and from doing other things of a like character, although they did not own any patents or patent applications.

By subdivision 33 of the final judgment (R. 7674) the individual defendants were enjoined from holding or controlling, directly or indirectly, any of the issued and outstanding capital stock, bonds or other evidences of indebtedness of more than one corporation engaged either in the manufacture and sale of glassware or in the manufacture and distribution of machinery used in the manufacture of glassware or in both. Certain exceptions are made as to holding stock solely in a fiduciary capacity for persons other than defendants, and holding stock in a subsidiary corporation of the parent of which he is an officer, director, agent or employee and the like, but apparently no consideration is given to the fact that there was no claim that Thatcher Manufacturing Company, or any of the individual defendants associated with it, had owned any stock in any other company engaged in the manufacture of glassware for any purpose connected with this case.

The foregoing instances are merely illustrations, and the injunctions complained of are referred to in detail in the specification of assigned errors intended to be urged.

ARGUMENT

I

In connection with specifications numbered one, two, three and four of the assigned errors, it is stated that each of the findings and adjudications contained in subdivisions 3, 4, 6 and 7 of the final judgment is complained of on the ground that it is not sustained by the evidence and is contrary to law, said Thatcher Manufacturing Company being merely a licensee of patented feeding and forming machines for the manufacture of milk bottles and not the owner of any patents on such machines and such findings and adjudications being based primarily on its having had an exclusive license for a certain type of milk bottle forming machine and an unrestricted license for feeders, while some others were denied licenses for such machines and some were given limited licenses for such feeding machines and for other types of forming machines.

We think it fairly appears from that part of the opinion of the District Court, heretofore quoted in this brief, relating to Thatcher Manufacturing Company (Opinion 74) that the decision to hold Thatcher Manufacturing Company as a participant in the conspiracy relating to patents or patented machinery for the manufacture of glassware was based on the conclusion that the licensing system of Hartford-Empire Company was illegal. Proceeding from this assumption relating particularly to the question of the right of Hartford-Empire Company to grant an exclusive license and the right of a licensee to have an exclusive license and the question of the right of Hartford-Empire Company to grant an unlimited license to one licensee and restrict competition with that licensee by limiting the licenses to others, the court found that Thatcher Manufacturing Company had participated in a conspiracy by reason of what it did in connection with the

limiting by Hartford-Empire Company of the production of competing licensees.

In the third paragraph of that part of the opinion of the District Court heretofore quoted, entitled "The Conspiracy as Related to Milk Bottles," (Opinion 74) it is said that Thatcher Manufacturing Company never received an exclusive license on the Hartford single feeder, but that the record shows that Hartford felt morally bound not to license anyone to use the single feeder for the production of milk bottles without Thatcher's consent, and that Thatcher warned Hartford that it would consider this an unfriendly act.

If Hartford-Empire Company had the right, which a patentee ordinarily has, to grant an exclusive license, but did not grant an exclusive license to Thatcher Manufacturing Company to use the Hartford single feeder in the manufacture of milk bottles, but felt morally bound not to license anyone to use the single feeder for the production of milk bottles without Thatcher's consent on account of exclusive rights which it formerly had for the use of Hartford equipment in the milk bottle field, there would be nothing illegal for Thatcher to avail itself of such protection as it could obtain, from Hartford-Empire Company, in the way of exclusive patent rights.

In the next paragraph of the opinion of the District Court (Opinion 74) it is said that under a new general agreement of January 1, 1936, Exhibit 248, Hartford continued to extend exclusive rights for the manufacture of milk bottles to Thatcher. It seems clear that the conclusion of the District Court that Thatcher Manufacturing Company ought not to have any exclusive rights as a licensee from Hartford-Empire Company, and ought not to be protected from competition by any limitation by Hartford-Empire Company of its licenses to others, was based on the conclusion that the Hartford-Empire Company had,

in some way, lost the right to grant exclusive licenses and the right to protect its licensees from competition. Otherwise Thatcher Manufacturing Company would have been within its rights as a licensee in accepting an exclusive license if it could get it, and in accepting any protection from competition which its licensor might afford it by refusing or limiting licenses to others.

In another paragraph of this part of the opinion (p. 75) reference is made to a letter from W. E. Levis of the Owens-Illinois Glass Company to R. H. Levis dated October 2, 1932, Exhibit 783 (R. 13459, ad. 2002), in which W. E. Levis says that, with the plans they now have, there is certain to be a curtailment of the promiscuous manufacture of milk bottles on non-licensed feeders, which will result in their company's and the Thatcher Company's securing a greater proportion of the available milk bottle business; and that this should stabilize the price and increase the earnings of Thatcher Company.

It appears from the next paragraph of the opinion (p. 75) that about this time the Illinois Glass Company, which had then become merely an investment concern, of which W. E. Levis was president, and in which R. H. Levis was interested, had purchased a substantial amount of stock of Thatcher Manufacturing Company. The statement in the letter that the curtailment of promiscuous manufacture of milk bottles on non-licensed feeders should stabilize the price, and increase the earnings of the Thatcher Manufacturing Company, evidently means the price of Thatcher Company stock which had recently been purchased. The restriction of the manufacture of milk bottles on infringing machinery would naturally benefit a licensee of patented machinery.

It is said in the opinion (p. 76) that Knox was brought into the fold under an extremely limited license whereby it was granted the right to make 75,000 gross of milk bottles

annually and in that connection reference is made to Exhibit 246 (R. 12769), a letter from H. Goodwin Smith to Amory Houghton, president of Corning, and also a director of Hartford, in February, 1934, and it is said that the letter says that the license they gave Knox on milk bottles was limited and was approved by Thatcher and Owens.

This is followed by a statement that Thatcher, as a favored licensee, exerted a keen interest in limiting production of other licensees for the manufacture of milk bottles and in preventing other companies from obtaining a license to manufacture milk bottles.

This involves the same question of the right of Hartford-Empire Company to grant an exclusive license, or with such terms to one licensee and limits upon licenses to another as it saw fit, and if it had the usual rights of a patentee in this particular the conduct of Thatcher Manufacturing Company was within its rights as a licensee.

Reference is again made in the opinion (p. 77) to the letter from F. Goodwin Smith of Hartford to Amory Houghton of Corning dated February 17, 1934, Exhibit 246, in which Mr. Smith comments on the purchase by Thatcher Manufacturing Company of the Peerless plant.

This letter, Exhibit 246 (R. 12769, ad. R. 1045) was a government exhibit and contains the statement (R. 12770) which is not contradicted by any other evidence in the record, that Peerless Glass Company would have been liable to Hartford for approximately $200,000 for damages for infringement.

The purchase by Thatcher Manufacturing Company of the Peerless plant is referred to in paragraph 136 of the complaint (R. 40) wherein it is stated that in 1933 Thatcher purchased Peerless Glass Company, a manufacturer and distributor of milk bottles. Thatcher did not purchase the Peerless Glass Company but purchased the plant as stated by the court below. It is not alleged in the complaint that

the purchase was unlawful or for the purpose of suppressing competition. The Peerless Glass Company was not a licensee of Hartford-Empire Company but was an infringer of its patents. (Ex. 246, R. 12770.)

Unless Hartford-Empire Company had forfeited the right to prevent infringement of its patents it could have suppressed the manufacture of milk bottles by Peerless Glass Company. Under these circumstances the competition of Peerless Glass Company was not lawful competition with a licensee of Hartford-Empire Company paying royalties for the use of patented machinery of the kind being used by the Peerless Glass Company in defiance of Hartford-Empire Company's patents. The only way one could meet such unlawful competition would be to become itself an infringer in order to use such machinery without the payment of royalties. Unless the Hartford patents were not enforceable, the purchase by the licensee of Hartford of the plant of the infringer was about the only legal procedure that it could take.

Upon buying the Peerless plant Thatcher Manufacturing Company did not close it up, or use it to suppress competition, but improved it and enlarged it and used it as a legitimate source of supply for the demand for milk bottles in the locality in which the plant was located.

The purchase by Thatcher Manufacturing Company of the milk bottle business of Knox Glass Bottle Company is referred to in paragraph 136 of the complaint (R. 40). The testimony of Roy R. Underwood, president of Knox Glass Bottle Company, and its seven associated companies, commences on page 1508 of the record. On page 1539 Mr. Underwood says that during the latter part of 1932 they were notified by representatives of Hartford that they should begin to get within their limit which was set forth in the agreement. On page 1540 in response to an inquiry as to whether his business was profitable on the basis of the

rate fixed at 75,000 gross per year, he replied that it was not, under that particular set up, that it would require partial furnace operation equal to about two machines, and that insofar as their particular set up was concerned it would be unprofitable in their opinion.

He was then asked what he did then with reference to the sale of their milk bottle business, and he replied that he sold it to Thatcher Manufacturing Company, Elmira, New York. He was asked to tell how the sale was brought about and he replied that he contacted Mr. Mandeville, then Chairman of the Board of Thatcher Manufacturing Company, early in December, 1932, in Elmira, as a result of an appointment made with him; that he advised Mr. Mandeville of their situation and asked him if he would be interested in purchasing their milk bottle business, and he said that he would be. Mr. Underwood was then asked why he went to Mr. Mandeville and he replied that he contacted Mr. Mandeville because he headed the leading manufacturer of milk bottles in the industry.

It is contended that there was nothing illegal in such a purchase or in the contract between Thatcher Manufacturing Company and the Knox Company, collateral thereto, providing that the Knox Company would not engage in the manufacture of milk bottles for a ten-year period. Thatcher Manufacturing Company did not buy out the entire business of Knox Bottle Company but purchased only a relatively minor part, that relating to the manufacture of milk bottles. The ten-year period above mentioned expired about the time of the entry of the judgment in the court below.

In the opinion of the court below (p. 77) it is said that, since 1935, Thatcher and Owens as the leading manufacturers of milk bottles, Thatcher producing about 40% and Owens about 27%, had been in close cooperation. Presumably the statement about close cooperation is based on what follows, which is to the effect that substantial blocks of the

stock were owned by the Illinois Glass Company until its recent dissolution, that the latter company was owned and controlled by W. E. and R. H. Levis and members of their families, and that, when W. H. Mandeville was elected to the Board of Thatcher, he was requested by W. E. Levis to represent their stock interest on the Board and keep in contact with them regarding the situation, and that he agreed to do so. It is then said W. H. Mandeville is still on the Board of Thatcher.

If W. E. Levis and R. H. Levis and members of their families, either directly or through the Illinois Glass Company, saw fit to buy sufficient stock of Thatcher Manufacturing Company to elect a member of the Board of Directors, there was no way that Thatcher Manufacturing Company, or the individual defendants associated therewith, could prevent it. In such a case, any person whom they would elect as director would be expected to represent their stock on the Board and keep in contact with them regarding the situation. That would not prevent him from occupying the same relation with all the other stockholders of Thatcher Manufacturing Company, and his agreement to do that would not add to his responsibility or interfere with his freedom of action as a director.

This seems to be all that the court relies upon, at least at this point, in showing any close cooperation. It certainly could not make Thatcher Manufacturing Company, or the individual defendants associated therewith, participants in a conspiracy. Owens had no interest in any of this stock nor did it own any interest in Illinois Glass Company.

II

It was contended by the Government in the District Court that licenses providing for a division of the fields of ware involved an attempt to control the manufacture of an

unpatented product. This contention was adopted by the District Court as shown by its conclusion of law No. 33 which is as follows (R. 7409):

> "Patent license agreements between the principal manufacturer and distributor of automatic machinery used in the manufacture of unpatented glassware, and manufacturers of unpatented glassware, containing restrictions designed to result in restriction or stabilization of production of unpatented glassware made on such machinery, and which have that effect, are contracts in violation of Section 1 of the Sherman Act in that they unreasonably restrain trade, regardless of the fact that the license agreements do not contain provisions fixing, pegging or stabilizing the price at which glassware made on the license machinery may be sold."

Concerning this point the opinion of the District Court contains the following, commencing on page 145 of the opinion:

> "It occurs to me that if the issuance of restrictive licenses by patentees on the use of machinery used in an industry wherein the patentees are important units, is part of a common scheme or cooperative effort upon the part of these units to obtain dominance of and unreasonably restrain trade in an industry engaged in producing an unpatented article, then certainly a court of equity has the power to declare such restrictions illegal in an action based on the anti-trust laws.
>
> "If the Hartford-Empire Company had extended to its licensees unrestricted licenses, permitting them the use of its machinery without limitations upon the use, kind or quantity, etc., of the unpatented product of the machine and had left them to sell at any price that open competition might dictate, free from any hidden threat, it could not be said that the patentee or licensor would fail to obtain a reasonable reward within the grant of the patent.
>
> "By the operation of the restrictive license plan, Hartford managed to protect the monopoly that Corning attained over the manufacture of the lines

> of ware particularly reserved to it; it was able to establish a milk bottle monopoly through its license to Thatcher, and a fruit jar monopoly through its license to Ball Brothers."

In support of these conclusions the court cites and quotes from *Standard Sanitary Mfg. Co. vs. United States*, 226 U. S. 20; *Morton Salt Co. vs. Suppiger Co.*, 314 U. S. 488; *Ethyl Gasoline Corp. vs. United States*, 309 U. S. 436, and *Bement vs. National Harrow Co.*, 186 U. S. 70. (Opinion, pages 147-150.)

In the case of *Standard Sanitary Mfg. Co. vs. United States*, 226 U. S. 20, it was held that the contracts which were involved accomplished a restraint of trade condemned by the Sherman Law. The nature of the contracts is shown by the following quotation from the opinion (page 47):

> "Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected thmselves to certain rules and regulations, among others not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers."

In the case of *Morton Salt Co. vs. Suppiger Co.*, 314 U. S. 488, it was held that a patentee, who has granted a license on condition that the patented invention be used by the licensee only with unpatented materials furnished by the licensor, may not restrain, as a contributory infringer, one who sells to licensee like materials for like use; and that

a court of equity will not lend its aid to protect a patentee against direct infringement in such a case, at least until such improper use of the patent has been abandoned and the consequences of such misuse of the patent dissipated.

In the case of *Ethyl Gasoline Corp. vs. United States,* 309 U. S. 436, it was held that a patentee may grant licenses to make, use or vend, restricted in point of space or time or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together do not give; that he may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices, processes or materials which lie outside the monopoly of the patent licensed; or condition the license so as to control conduct by the licensee not embraced in the patent monopoly. As illustrations of conditions attempting to control conduct by the licensee not embraced in the patent monopoly the opinion of this court cites *Standard Sanitary Mfg. Co. vs. United States,* 226 U. S. 20, and *Interstate Circuit vs. United States,* 306 U. S. 208. The case of *Standard Sanitary Mfg. Co. vs. United States* has been discussed. The case of *Interstate Circuit vs. United States* involved contracts concerning the distribution of motion picture films requiring exhibitors to agree to charge a fixed minimum admission price and not to show such films as part of a double bill. Such contracts were held to be unlawful although the films were copyrighted. In the opinion, on page 228, reference is made to the argument that the distributors were free to license the films for exhibition subject to the restrictions, just as a patentee in a license to manufacture and sell the patented article may fix the price at which the licensee may sell it, but, it is said, it does not

follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which should be paid for an entertainment which includes features other than the particular picture licensed.

In the case of *Bement vs. National Harrow Co.*, 186 U. S. 70, it was held, referring to the Sherman Act, that there is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by defendant. Following the reference to and quotation from this case, in the opinion of the District Court, it is said that there is no attempt in this contract relationship to control an unpatented product of the patented article. This is followed by the statement that, in the case at bar, we have the license restrictions on the use of the glass-making machinery of Hartford so drawn as to limit the quantity output, the kind and use of the product of the machines, to-wit, glass containers, and the effect of these restrictions is to affect a control over the entire glass-making industry that unduly and unreasonably restrains trade therein.

It is contended that these cases do not sustain the conclusion of the District Court in support of which they are cited in its opinion. Based on this conclusion the court held that the license agreement between Hartford-Empire Company and Thatcher Manufacturing Company in accordance with which it had an exclusive license on a certain type of milk bottle forming machine and an unlimited, but not exclusive, license to use the Hartford single feeder in the manufacture of milk bottles, was illegal. The contract of January 1, 1936, between Hartford-Empire Company and Thatcher Manufacturing Company, and other prior contracts, were cancelled in Subdivision 27 of the final judgment.

III

In assignment of error No. 25 reference is made to the holding of the District Court that once a defendant has been shown to have been a party to a conspiracy in violation of the antitrust laws the burden is on that defendant to go forward and show that it thereafter took some positive step to denounce or withdraw from the conspiracy. (Conclusion of Law No 42, R. 7411.)

It is contended that this holding is contrary to the ruling of this court in the case of *Standard Oil Company vs. United States*, 283 U. S. 163, 181, in which the opinion contains the following:

> "Seventh. The remaining issues in the case have become moot. The government objected to a number of early Indiana Company licenses which contained certain territorial restrictions on the production of cracked gasoline; and also to a provision in the first contract between primary defendants, and in licenses thereunder, by which the Indiana Company secured an option to purchase a portion of the cracked gasoline manufactured in, or shipped into, its sales territory. At the hearing before the District Court it appeared that these provisions had never been enforced. Upon the court's request the objectionable clauses were voluntarily cancelled some months before the entry of the decree. Similarly, the propriety of certain blanket acknowledgments of patent validity in the first contract, and in a number of licenses under later contracts, were questioned by the lower court. At its suggestion, these provisions also were formally cancelled by the parties. As the relief here sought is an injunction and hence relates only to the future, * * * the alleged validity of such provisions has become moot."

It is contended that Thatcher Manufacturing Company was not, at any time, a participant in any conspiracy in restraint of trade, and, further, that everything that preceded the year 1936 has become immaterial and relatively unimportant. It will be observed that the situation which

was arrived at between Hartford-Empire Company and Thatcher Manufacturing Company was not brought about by the pressure of legal proceedings. That condition was arrived at, and existed some time, before the commencement of this action.

SUMMARY

It is therefore contended, on behalf of Thatcher Manufacturing Company and the individual defendants associated therewith, that the contractual relations existing between Thatcher Manufacturing Company and Hartford-Empire Company, at the time of the commencement of this action, were valid and lawful and should not have been cancelled by the judgment of the District Court. Thatcher Manufacturing Company was using patented machinery under license from Hartford-Empire Company in the manufacture of milk bottles. It was entitled to such protection from competition as the patent law gave to it under its license and as its licensor might rightfully extend to it by limiting or refusing licenses to others.

IV

If the foregoing contention is not sustained, and if this court should hold that such licenses were properly cancelled, there was no occasion for injunctions and orders of the character hereinafter complained of by these appellants.

Those injunctions and orders, and the references thereto in the specifications of assigned errors intended to be urged on behalf of Thatcher Manufacturing Company and the other appellants associated with it, are as follows:

(A) The injunction contained in subdivision 9 of the final judgment of the District Court and referred to in specification No. 5 of the assigned errors.

(B) The injunction contained in subdivision 21 of the

final judgment and referred to in specification No. 6 of the assigned errors.

(C) The injunction contained in subdivision 23 of the final judgment and referred to in specification No. 7 of the assigned errors.

(D) The injunction and order contained in subdivision 24 of the final judgment and referred to in specification No. 8 of the assigned errors.

(E) The injunction contained in subdivision 25 of the final judgment and referred to in specification No. 9 of the assigned errors.

(F) The injunction contained in subdivision 26 of the final judgment and referred to in specification No. 10 of the assigned errors.

(G) The injunctions and orders contained in subdivision 27 of the final judgment and referred to in specification No. 11 of the assigned errors.

(H) The injunctions and orders contained in subdivision 28 of the final judgment and referred to in specification No. 12 of the assigned errors.

(I) The injunction contained in subdivision 29 of the final judgment and referred to in specification No. 13 of the assigned errors.

(J) The injunction contained in subdivision 30 of the final judgment and referred to in specification No. 14 of the assigned errors.

(K) The orders contained in subdivision 31 of the final judgment and referred to in specification No. 15 of the assigned errors.

(L) The injunction contained in subdivision 32 of the final judgment and referred to in specification No. 16 of the assigned errors.

(M) The injunctions and orders contained in subdivision 33 of the final judgment and referred to in specification No. 17 of the assigned errors.

(N) The orders contained in subdivision 34 of the final judgment and referred to in specification No. 18 of the assigned errors.

(O) The injunctions contained in subdivision 36 of the final judgment and referred to in specifications Nos. 19 and 20 of the assigned errors.

(P) The injunction contained in subdivision 40 of the final judgment and referred to in specification No. 21 of the assigned errors.

(Q) The injunctions contained in subdivisions 51, 52, 53, and 54 of the final judgment and referred to in specification No. 22 of the assigned errors.

(R) The order contained in subdivision 55 of the final judgment and referred to in specification No. 23 of the assigned errors.

IV-A

The general injunction contained in paragraph 9 of the final judgment (R. 7660) is clearly in violation of law.

It is provided by Section 383 of Title 28 U. S. Code as follows:

> "Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same. (Oct. 15, 1914, c. 323, Sec. 19, 38 Stat. 738.)"

In the case of *National Labor Relations Board vs. Express Publishing Co.* 312 U. S. 426, 85 Law Ed. 931, the opinion contains the following:

"A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. *Swift & Co. vs. United States,* 196 U. S. 375, 49 L. ed. 518, 25 S. Ct. 276; *New York, N. H. & H. R. Co. vs. Interstate Commerce Commission,* 200 U. S. 361, 404, 50 L. ed. 515, 526, 26 S. Ct. 272, and see under the National Labor Relations Act, *National Labor Relations Bd. vs. Swift & Co.* (CCA 7th) 108 F (2d) 988."

IV-B

The injunction contained in subdivision 21 of the final judgment (R. 7665) is to the effect that Thatcher Manufacturing Company and the individual defendant associated therewith and other defendants, who hereafter shall engage or continue to engage in the business of distributing machinery used in the manufacture of glassware in interstate commerce, are enjoined from leasing or otherwise distributing or surrendering possession of said machinery by means other than by an outright sale for cash or on credit not to extend over a period of more than two years. Thatcher Manufacturing Company and associated defendants have not been engaged in the business of distributing machinery used in the manufacture of glassware and do not contemplate being so engaged. It is fundamental that an injunction relates to the future and is limited to pre-

venting something which a defendant has done or threatened to do. The primary purpose of this injunction was to terminate the practice of Hartford-Empire Company of leasing its machinery in connection with licensing the use of it. If it could be argued that Thatcher Manufacturing Company might, at some time in the future, engage in the business of leasing machinery to be used in the manufacture of glassware, it would not be on any such scale, or in any such manner, as it has been done by Hartford-Empire Company and such an injunction would be inappropriate against Thatcher Manufacturing Company, even in such a case. It is a serious question whether the licensing system of Hartford-Empire Company is to be terminated by an order preventing it from leasing or otherwise distributing or surrendering possession of machinery by any means other than by an outright sale. Thatcher Manufacturing Company and associated appellants contend that the order of the District Court, in that respect, should be reversed or materially modified.

IV-C

The injunction contained in subdivision 23 of the final judgment (R. 7666) is to the effect that Thatcher Manufacturing Company and the individual defendants associated therewith, and other defendants, are enjoined from engaging in the distribution of machinery used in the manufacture of glassware or in the distribution of glassware in interstate commerce unless they, and each of them, while engaging in or continuing to be engaged in the distribution of machinery used in the manufacture of glassware in interstate commerce, shall, by written instrument filed with the clerk of the District Court, agree to offer and continue to offer to sell such machinery to any applicant at reasonable and equal prices and equal terms and

conditions of sale to each applicant, provided that said sales are not thereby required to be made to any applicant not having a proper credit rating, unless said applicant offers to pay cash, and provided that nothing in this paragraph 23 shall be construed to prevent changes in price structure based upon a change in economic or market condition if notice of at least thirty days of any such change in price structure is first given to the glassware industry; and provided further that any applicant as to whom any of said defendants refuses to sell said machinery as provided in this paragraph may apply to the court on thirty days' notice only to the defendant which shall have refused to make said sale and to the Attorney General of the United States, for an order requiring and directing said defendant to make such sale.

Thatcher Manufacturing Company and associated individual defendants have not been engaged in the distribution of machinery used in the manufacture of glassware and do not contemplate being so engaged. They object to this injunction and contend that it is error on account of imposing an undue hardship upon them in a matter with which they have not been connected. Its provisions are obscure, in some respects, and they might be in contempt of court for not filing such an instrument, if this provision stands, although they were not engaged in the distribution of such machinery, if they continue to be engaged in the distribution of glassware in interstate commerce.

IV-D

The injunction and order contained in subdivision 24 of the final judgment (R. 7667) are to the effect that Thatcher Manufacturing Company and the individual defendants associated therewith, and other defendants, are enjoined from engaging in the distribution of machinery used in the manufacture of glassware or in the distribution

of glassware in interstate commerce unless it or he shall, by instrument filed with the clerk of the District Court, (a) agree to license without royalty or charge of any kind and for the life of the patent any applicant to make, to have made for it and use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents or patent applications now owned by each of such defendants; (b) agree to license, at a reasonable royalty, any applicant to make, have made for it, and to use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents granted on patent applications filed subsequent to the date of said judgment, and then owned or controlled by each of such defendants; and (c) agree to make available to any licensee under sub-paragraphs (a) and (b) of this paragraph, a copy (at a cost not to exceed the cost of preparing the copy plus a reasonable profit) of any and all drawings and patterns owned or controlled by the respective defendant relating to the machinery or methods used in the manufacture of glassware embodying licensed inventions but that this sub-paragraph shall not apply to Lynch type forming machines for the production of narrow neck glass containers.

It is further provided that if any dispute arised between any applicant for a license or a licensee and any defendant under paragraphs (a), (b) or (c) of this paragraph 24, such dispute shall be determined by the District Court on petition by either such applicant or licensee or the defendant involved, on thirty days' notice to the other party to the dispute and to the Attorney General of the United States.

Thatcher Manufacturing Company and the individual defendants associated therewith have not been engaged in the distribution of machinery used in the manufacture of glassware and have not contemplated being engaged therein

and did not, at the time of the commencement of this action or at the time of the rendition of the judgment, so far as shown by any evidence, own or control any patents or patent applications, drawings or patterns relating to machinery or methods used in the manufacture of glassware. There was no basis for requiring them to agree to grant licenses on the terms stated in this subdivision of the judgment or on any terms, and to require them to file a written instrument containing such agreements would be misleading and prejudicial. These provisions are objected to by Thatcher Manufacturing Company and the appellants associated with it and it is contended that it was error for the court to extend to them a requirement which had no application to their case.

IV-E

The injunction contained in subdivision 25 of the final judgment (R. 7668) is to the effect that Thatcher Manufacturing Company and the individual defendants associated therewith, and other defendants, and each of them, whenever regularly engaged in the manufacture and distribution of machinery used in the manufacture of glassware in interstate commerce are enjoined from discriminating, by means of wholly exclusive or partially exclusive requirement contracts with glassware manufacturing companies or otherwise, against any manufacturer of glassware, present or prospective, in the filling of orders for such machinery on the basis of the size of the order, the credit position of the customer (providing the customer pays cash), his standing in the industry or otherwise; and that each of said defendants is perpetually enjoined and restrained from directly or indirectly agreeing, conspiring or combining with any other person, firm, or corporation for the purpose of obstructing or delaying the furnishing of any such machinery to any such customer or applicant,

provided that nothing in said paragraph 25 shall prohibit a defendant from obtaining a contract or from enforcing contractual or other rights which are not otherwise prohibited by the terms of said judgment.

Thatcher Manufacturing Company and the individual defendants associated therewith had not been engaged in the distribution of machinery used in the manufacture of glassware and there was no evidence that any of them contemplated being so engaged. There was no basis for extending to them the provisions of this subdivision of the judgment and it is contended that it was error for the District Court to include them therein.

IV-F

The injunction contained in subdivision 26 of the final judgment (R. 7669) is to the effect that Thatcher Manufacturing Company and the individual defendants associated therewith, and other defendants, are enjoined, until the entry of the finding by the District Court, after petition filed by such defendants on thirty days' notice to the Attorney General of the United States and the hearing thereon that the consequences of the conduct of such defendants in the violation of the Sherman Anti Trust Act and the Clayton Act have been fully dissipated, from (a) bringing, maintaining, or taking any action in pursuance of any suit or suits for infringement of any patent or patents now owned or controlled by any such defendants, or hereafter issued on pending applications now owned or controlled by any such defendants, covering inventions embodied in the machinery used in the manufacture of glassware, (b) attempting to interfere by a suit or otherwise with the possession of machinery used in the manufacture of glassware now owned or claimed to be owned by any such defendant and which machinery is in the possession of a licensee or

lessee of such defendant except insofar as may be necessary to enforce the terms of any contract of sale entered into pursuant to paragraph 21 of this judgment, and (c) attempting by suit or otherwise to collect royalties or license fees or profits for the use of invention covered by patents now issued or hereafter issued on applications now pending embodied in machinery used in the manufacture of glassware licensed or leased by any such defendant.

Thatcher Manufacturing Company and the individual defendants associated therewith owned no patents covering inventions embodied in machinery used in the manufacture of glassware at the time of the commencement of this action, or at the time of rendition of the judgment, so far as shown by the evidence. It does not appear that any of them owned or claimed to own any machinery for the manufacture of glassware and the situation, as shown by the evidence, was that Thatcher Manufacturing Company was using machinery owned by Hartford-Empire Company which was licensed and leased to Thatcher Manufacturing Company. There was no occasion for extending to Thatcher Manufacturing Company and the individual defendants associated therewith the provisions of this injunction and it is contended that the District Court erred in so doing.

IV-G

The injunctions and orders contained in subdivision 27 of the final judgment (R. 7670) were to the effect that various agreements therein specified, including the license agreements dated December 8, 1920, April 13, 1928, and January 21, 1936, between Hartford-Fairmont Company or Hartford-Empire Company and Thatcher Manufacturing Company were declared to be unlawful and they were thereby cancelled, and the observance in any respect of each of such agreements, leases, licenses, and amendments

thereto was thereby enjoined and such defendants were directed to cause any of its subsidiaries who were party to any such agreements, leases, licenses, or amendments thereto to assent in writing to the cancellation thereof.

The ruling of the District Court that the license agreements between Hartford-Empire Company and Thatcher Manufacturing Company were unlawful and were therefore cancelled is contended to be erroneous. This matter has been discussed in a prior subdivision of this brief.

IV-H

The injunction and order contained in subdivision 28 of the final judgment (R. 7671) are to the effect that each agreement, together with all amendments thereto, relating to the leasing of machinery used in the manufacture of glassware, or the licensing of patented inventions embodied in machinery used in the manufacture of glassware, between Hartford-Empire Company and each of its licensees, is cancelled as of a date thirty days subsequent to the effective date of the judgment of the District Court.

These provisions include the license agreements between Hartford-Empire Company and Thatcher Manufacturing Company and present again the question referred to under a preceding subdivision of this brief.

It will be observed that the District Court has cancelled not only the agreements between Thatcher Manufacturing Company and defendants in the case, relating to the leasing of machinery used in the manufacture of glassware or licensing of patented inventions embodied in such machinery, but has cancelled all such agreements between Hartford-Empire Company and defendants who were discharged from the case and between Hartford-Empire Company and licensees who were not made parties defendant.

The effect of this is to say that the license contracts of

Thatcher Manufacturing Company are cancelled without any fault on its part but merely on the basis of the finding, against Hartford-Empire Company, that such contracts were illegal. Otherwise the court would not have cancelled such agreements with defendants who were dismissed or between Hartford-Empire Company and licensees who were not made defendants in the case.

This subdivision of the judgment also provides that the receiver shall notify all licensees of Hartford-Empire Company of the cancellation of said licenses and offer them new licenses and offer to sell the machinery to the licensees. It is provided that a copy of such proposed new licenses shall be furnished to the Attorney General and to the Hartford-Empire Company and that the approval of the District Court shall be obtained as to the form of such licenses; and that if the Attorney General or the Hartford-Empire Company shall object to the proposed form of any such new licenses they may be heard by the court prior to the final determination as to the form thereof.

As a result of these later provisions there might be an interval of time during which Thatcher Manufacturing Company would have no license to use the machinery in its possession for the manufacture of glassware. It is contended that the court erred in the provisions of this subdivision of the final judgment.

IV-I

The injunction contained in subdivision 29 of the final judgment (R. 7672) is to the effect that Thatcher Manufacturing Company and the individual defendants associated therewith, and other defendants, are enjoined from inserting or enforcing or requiring any other party to agree to any provision in any agreement heretofore or hereafter entered into which (a) directly or indirectly limits or re-

stricts (1) the type or kind of product which can be produced with or upon machines or equipment or process embodying inventions licensed under patents or patent applications owned or controlled by him or it, (2) the use of such products so produced, (3) the character, weight, color, capacity or composition of the products so produced, (4) the quantity thereof so produced, (5) the market to or in which the same may be sold or distributed, (6) the price or terms of sale or other disposition of such products, or (7) the use of any machinery or equipment distributed, or patented inventions licensed, by him or it, to use in connection with any other machinery or equipment distributed, or inventions licensed, by him or it, or to use in any specified plant or locality; or (b) gives or purports to give a right to terminate any license if the machinery or equipment is not so used; or (c) which expressly provides that any licensee shall not contest the validity of any patent or patents of such defendants; or (d) provides that parts and equipment constituting improvements on leased or sold machinery, made by the licensee, shall become the property of the lessor or vendor; or (e) provides that rights to improvements including inventions, patent applications and patents covering licensed inventions embodied in machinery or processes or methods made or acquired by the licensee, shall become the exclusive property of the lessor or vendor; or (f) grants to any licensee, lessee or vendee of any product, machine or equipment, when such product, machine or equipment embodies inventions covered by patents or patent applications owned or controlled by it or him, a preferential position, whether by means of lower rates of royalty, by different provisions of licensing, leasing or selling, by exclusive licenses, rebates, discounts, a share in net or gross income or any part thereof, or by any other means.

At the time of the commencement of this action and at the time of the rendition of the judgment, so far as appears

by the evidence, neither Thatcher Manufacturing Company nor any of the individual defendants associated therewith, owned or controlled any patents or patent applications relating to machinery for the manufacture of glassware and there is no evidence that any of them contemplated owning or controlling any such patents or patent applications. The substance of this injunction is to carry out the theory of the District Court that it was unlawful for the owner of a patent to insert provisions in licenses of the character mentioned. It is contended that the injunction is erroneous for the reasons stated in a former subdivision of this brief dealing with that subject. It is also contended that this provision is erroneous as having no application to a defendant who had not been and was not to be a licensor of any patent.

IV-J

The injunction contained in subdivision 30 of the final judgment (R. 7673) is to the effect that Thatcher Manufacturing Company and the individual defendants associated therewith, and other defendants, and each of them, their officers, directors, agents and employees are enjoined from entering into any agreement with Hartford-Empire Company containing any of the provisions enumerated in said paragraph 29 of said judgment.

By this subdivision of the judgment the injunction contained in the former paragraph is extended to licensees and they are prohibited from entering into any agreement with Hartford-Empire Company containing the provisions which the court found to be objectionable. From the standpoint of the licensee it is contended that the provisions of this injunction are erroneous for the reasons set forth in a prior subdivision of this brief dealing with that subject.

IV-K

The effect of subdivision 31 of the final judgment (R. 7673) is that the form of any agreement between any of the defendants and of any license agreement made pursuant to this judgment and to which any of the defendants is a party, shall be subject to the approval of the District Court, on petition by any defendant proposing to enter into such an agreement, on ten days' notice to the Attorney General; provided, however, that it shall be unnecessary to obtain the approval of the court as to the form of any agreement which is identical (except as to parties, dates, number, and types of machines involved) with any form theretofore approved by the court.

Before Thatcher Manufacturing Company can obtain a license to operate the machinery in its plant for the manufacture of milk bottles, it must, according to this subdivision of the judgment, present a petition to the District Court and give ten days' notice to the Attorney General. It is provided that it be unnecessary to obtain such approval as to the form of any agreement which is identical with any form theretofore approved by the court, but there is no provision as to how any licensee is to be advised that any form has been approved by the court and this exception does not cover the parties, dates, number and types of machines involved. Such provisions are very likely to result in a suspension of operations in the plant of Thatcher Manufacturing Company during the time consumed in giving notice to the Attorney General and obtaining the approval of the court. It is contended that these provisions are erroneous on account of not being workable and also because they are based on the theory that former licenses must be cancelled.

IV-L

The effect of subdivision 32 of the final judgment (R. 7674) is that Thatcher Manufacturing Company and the individual defendants associated therewith, and other defendants, and each of them, are enjoined from requiring, requesting, or inducing Hartford-Empire Company or its officers, directors, agents or employees to seek the permission, advice or consent of said defendants or any of them before licensing newcomers in the glassware industry, or before allowing then existing licensees of Hartford-Empire Company to manufacture additional types, kinds or amounts of glassware.

This injunction is based on a theory, heretofore commented on, that the owner of a patent may not grant exclusive licenses, or grant unlimited use of the patented device to one licensee and limit the use or uses of others and consequently may not consult with such unlimited licensee as to the policy of the extent of the competition to be permitted by other licenses. It is contended that that theory is erroneous and that this injunction is erroneous.

IV-M

It is provided by subdivision 33 of the final judgment (R. 7674) that the individual defendants associated with Thatcher Manufacturing Company, with others, are enjoined from holding or controlling, directly or indirectly, or through corporations, agents, trustees, representatives, or nominees, any of the issued and outstanding capital stock, bonds or other evidences of indebtedness of more than one corporation engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware or in both; provided, however, that paragraph 33 shall not apply to

the holding of stock by any individual defendant solely in a fiduciary capacity for the benefit of a person or persons other than defendants herein and that no defendant so holding stock in a fiduciary capacity shall exercise any voting rights with respect to such stock or give any proxy to vote the same; and further provided that nothing in this paragraph 33 shall apply to the holding by any individual defendant of stock, bonds or other evidences of indebtedness of any subsidiary, parent, or subsidiary of the parent of a corporation in which he is an officer, director, agent or employee, or in any corporation solely engaged in business outside the territorial limits of the United States of America or its territories, provided further that such of the defendants Issac J. Collins, J. D. Dilworth, W. V. Fisher, T. C. Fulton, Alexander D. Falck, Amory Houghton, Arthur A. Houghton, Jr., and William E. Levis, if any, as may be required by this paragraph of this judgment to divest themselves of any stock, shall be permitted to divest themselves thereof over a period of not more than two years from the effective date of this judgment; provided further that such of the defendants as may be required by this paragraph to divest themselves of any stocks, bonds, or other evidences of indebtedness, shall submit to the court, with notice to the Attorney General, a written statement containing the name or names of those to whom said stock, bonds or other evidences of indebtedness has been sold or otherwise transferred.

There is no statement in the complaint in this action that any of the individual defendants associated with Thatcher Manufacturing Company did anything complained of except to act as officers, agents or employees of Thatcher Manufacturing Company in connection with matters complained of against it, and there is no statement in the bill of complaint that it or they did any of the things prohibited by this subdivision of the final judgment. There was evi-

dence concerning holdings of stock, bonds and other evidences of indebtedness by some of the individual defendants who were allowed two years within which to adjust their investments to the requirements of this paragraph of the judgment but the individual defendants associated with Thatcher Manufacturing Company were allowed no additional time whatever beyond the time when the judgment would become effective according to its terms. It is contended that there was no occasion for extending the provisions of this subdivision of the judgment to the individual defendants associated with Thatcher Manufacturing Company and that it should be set aside as to them and modified accordingly.

IV-N

It is provided by subdivision 34 of the final judgment (R. 7675) that the individual defendants associated with Thatcher Manufacturing Company, with others, who, on or subsequent to December 11, 1939, sold or otherwise transferred ownership or control of any stock, bonds, or other evidences of indebtedness of any corporation engaged in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware, other than the one in which he was an officer or director at the time of such transfer, should within ten days of the effective date of said judgment submit to the court, with notice to the Attorney General, a written statement containing the name or names to whom the stock, bonds or other evidences of indebtedness was sold or otherwise transferred, and it is further provided that each of the defendants Alexander D. Falck, Amory Houghton and Arthur A. Houghton, Jr., shall submit such a list containing the name or names, if any, of those to whom he has since December 11, 1939, transferred any of the stock there-

tofore held by him in Hartford-Empire Company, Empire Machine Company and Corning Glass Works.

The last provision would have no application to the individual defendants associated with Thatcher Manufacturing Company but it is contended that there is no pleading or evidence furnishing the basis for such an order as is made in this subdivision of the judgment requiring a written statement concerning sales of securities to be submitted to the court with notice to the Attorney General.

IV-O

It is provided by subdivision 36 of the final judgment (R. 7677) that Thatcher Manufacturing Company, and the individual defendants associated therewith, and other defendants, and each of them, while engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery to be used in the manufacture of glassware, or both, are perpetually enjoined from acquiring, purchasing, holding, or controlling, directly or indirectly, or through agents, representatives, or nominees, any of the assets (except goods or merchandise purchased in the ordinary course of business), or any of the capital stock or bonds or other evidences of indebtedness, as follows: in paragraph (A) of any other defendant corporation, except that any individual defendant may hold, own, or acquire capital stock or bonds or other evidences of indebtedness of the defendant corporation of which he is an officer or director, and in paragraph (B) of any other corporation, firm, or individual so engaged, provided however that this sub-paragraph (B) of paragraph 36 shall not prevent any of the corporate defendants from continuing to hold capital stock or bonds or other evidences of indebtedness in its own subsidiary as defined in paragraph (E) of paragraph 1, or any individual defendant from continuing

to hold capital stock or bonds or other evidences of indebtedness in the subsidiary of the defendant corporation of which he is an officer or director, or any of the corporate defendants from continuing to hold or acquiring assets, capital stock, or bonds or other evidences of indebtedness in any corporation engaged solely in business outside of the territorial limits of the United States of America or its territories.

In the absence of any evidence that Thatcher Manufacturing Company or any of the individual defendants associated therewith, had acquired, purchased, held or controlled any such assets, capital stock, bonds, or other evidences of indebtedness for any purpose relating to the matters complained of in this action, and there being no charge in the complaint that any such things were done by them, or any of them, it is contended that any incidental investment that any of them may have in the stock of another defendant company, or in the stock of a company engaged in the manufacture and sale of glassware or machinery to be used in the manufacture of glassware, should not be enjoined, that they should not be required to dispose of such holdings, if any, without some further inquiry, and that an injunction should not have been granted against them in the unqualified manner in which it is done in this subdivision of the judgment.

IV-P

In subdivision 40 of the final judgment (R. 7680) Thatcher Manufacturing Company, and the individual defendants associated therewith, and other defendants, including Glass Container Association of America, Inc., and each of the directors, officers, agents and employees of such of said defendants as are corporations, were enjoined and restrained from agreeing, combining, or conspiring with

any other defendant corporation, its directors, officers, agents and employees, or with any other manufacturer or seller of glassware or of machinery to be used in the manufacture of glassware, its directors, officers, agents and employees, with reference to certain matters therein enumerated, most of which pertain to alleged activities of Glass Container Association of America, Inc., which were complained of in the charges against it.

Some of the provisions of the injunction contained in this subdivision of the judgment are so sweeping and general that it might be difficult for one to engage in the business of making and selling glassware in interstate commerce and know what legitimate activities could be engaged in and it is therefore subject to the criticisms made of the general injunction heretofore complained of. Such part of the provisions of this subdivision as relate to the activities of Glass Container Association of America, Inc., are the subject of a separate appeal by it and it is contended on behalf of these appellants, that whatever the court may determine to be the legitimate activities of Glass Container Association of America, Inc., they should not be restricted from participating therein.

IV-Q

The injunctions contained in subdivisions 51, 52, 53 and 54 of the final judgment (R. 7686-7690) relate to patents, patent applications and exclusive rights under patents or patent applications, covering inventions embodied or employed in a machine or process used or to be used in the manufacture of glassware, and the acquiring of such rights, and are directed against methods claimed to have been employed by defendants acquiring and holding patents and prosecuting patent applications, and which were charged to be unlawful.

In the absence of any evidence that Thatcher Manufacturing Company or the individual defendants associated therewith had been engaged in any such activities, and in view of the known fact that Thatcher Manufacturing Company was at all times a licensee of the glass-making machinery which it employed in carrying on its business and that it was not acquiring patents, it is contended that the provisions of these subdivisions of the judgment have no application to Thatcher Manufacturing Company and said individual defendants and they should not have been included in the injunctions contained in these subdivisions of the judgment.

IV-R

It is provided in subdivision 55 of the final judgment (R. 7690), among other things, that for the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to any one of the defendant corporations made to the principal office of such defendant corporation, be permitted, subject to any legally recognized privilege, access, during the office hours of such defendant corporation, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of any of the defendant corporations relating to any matters contained in this judgment.

If being subject to any legally recognized privilege means that Thatcher Manufacturing Company has all the rights which it would have if no such order were made, then such an order is unnecessary as the Government would have the usual legal processes to obtain information.

If the effect of this order is to take away part of any legally recognized privilege to keep its records confidential,

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then it is difficult to anticipate what the effect of this order is. It is contended that it is vague and indefinite and an improper invasion of the rights of Thatcher Manufacturing Company which is wholly unnecessary in view of its situation in this case.

CONCLUSION

It is therefore contended, for the reasons above stated, and with respect to the various matters above specified, that the judgment of the District Court, as to these appellants, should be reversed and judgment rendered in favor of each of them.

Respectfully submitted,

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